

VERA ROSS,

Claimant,

v.

BOB & CONSTANCE COLE,

Employer,

and

AMERICAN ECONOMY INSURANCE,

Surety,

Defendants.

IC 02-001680

**FINDINGS OF FACT,
CONCLUSION OF LAW,
AND RECOMMENDATION**

Filed April 3, 2006

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers. In lieu of a hearing, the parties stipulated to submit this matter based on the pertinent contents of the Industrial Commission legal file. Initially, Claimant was represented by counsel; however, counsel was allowed to withdraw on January 9, 2006, and Claimant has represented herself at all times thereafter. Alan R. Gardner of Boise represents Employer/Surety. No post-hearing briefs were filed or post-hearing depositions taken and this matter came under advisement on March 14, 2006.

Pursuant to an Order Granting [Defendants'] Motion to Bifurcate dated March 13, 2006, the sole issue to be decided is whether or not the statute of limitations has run on Claimant's claim.

CONTENTIONS OF THE PARTIES

Claimant contends she has complied with all applicable statutes of limitation and, if she has not, it is the fault of her then-attorney.

Defendants contend Claimant's amended Complaint, filed after the Commission's Order Dismissing Complaint was entered, did not comply with Idaho Code §§ 72-701 and 72-706(1) regarding the filing of a Complaint within one year after the date of the accident, or claim made, where no benefits have been paid, and could not serve to revive this action.

EVIDENCE CONSIDERED

Pursuant to stipulation, the record in this matter consists of the Industrial Commission legal file.

FINDINGS OF FACT

PROCEDURAL HISTORY:

<u>Date</u>	<u>Event</u>
1-29-02	First Report of Injury or Illness filed.
7-23-02	Complaint filed listing date of injury as 10-28-01.
8-27-02	Answer filed raising, <i>inter alia</i> , Idaho Code §§ 72-701 and 706 as affirmative defenses.
2-24-03	Notice of Intent To Recommend Dismissal for failure to prosecute served - - no response.
4-17-03	Amended Notice of Intent to Recommend Dismissal for failure to prosecute served - - no response.
7-9-03	Order Dismissing Complaint without prejudice filed - - The Complaint may be refiled with the Commission at any time

**unless precluded by the statutory time limitations provided
within Idaho Code, Title 72.**

10-28-03

Amended Complaint (copy of original) filed.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-701 provides in pertinent part:

No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, **and** unless a claim for compensation with respect thereto shall have been made within **one (1) year** after the date of the accident . . . (Emphasis added).

Idaho Code § 72-706(1) provides in pertinent part:

When no compensation paid. When a claim for compensation has been made and no compensation has been paid thereon, the claimant, unless misled to his prejudice by the employer or surety, shall have **one (1) year from the date of making claim** within which to make and file with the commission an application requesting and an award under such claim. (Emphasis added).

1. There has been no compensation paid on this denied claim.
2. Claimant has not been misled to her prejudice by Employer or Surety.
3. The Order Dismissing Complaint filed July 9, 2003, has never been rescinded, quashed, or otherwise withdrawn and remains in full force and effect.

4. Claimant's alleged accident occurred on October 28, 2001; she had until October 28, 2002, to make a claim for compensation. Claimant prepared and filed a Form 1 with the Commission on January 29, 2002. It cannot be determined from the Form 1 whether Claimant's alleged Employer or Surety ever received a copy of the Form 1 but for the sake of this discussion, it will be presumed that either one or the other did. Therefore, Claimant had until January 29, 2003, at the latest, within which to file her Complaint.

5. Claimant filed her original Complaint on July 23, 2002, and that Complaint was dismissed on July 9, 2003, for failure to prosecute and failure to respond to the Notice Of Intent to Recommend Dismissal. On October 28, 2003, Claimant filed an Amended Complaint that was simply a copy of her original Complaint.

6. Claimant's Amended Complaint was not timely filed and her claim should be dismissed with prejudice.

CONCLUSION OF LAW

Claimant's Amended Complaint was not timely filed and should be dismissed with prejudice.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 28th day of March, 2006.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

VERA ROSS
219 E FOSTER AVE
COEUR D'ALENE ID 83814

ALAN R GARDNER
PO BOX 2528
BOISE ID 83701-2528

_____/s/_____

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